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**Implementation of recommendations on the six mandated areas
of the Forum and on the Millennium Development Goals**

Report of the secretariat of the Permanent Forum on Indigenous Issues on ongoing priorities and themes**

Summary

The present report is an overview of developments under the mandated areas of the Permanent Forum on Indigenous Issues since its fifth session, as reflected in the contributions of the United Nations system and activities of the members of the Forum and its secretariat.

* E/C.19/2007/1.

** The submission of the present report was delayed in order to ensure the inclusion of the most recent information.



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I. Introduction

1. Since the end of the fifth session of the Permanent Forum on Indigenous Issues, a variety of activities of relevance to indigenous peoples have been carried out by the intergovernmental system, Governments, indigenous peoples' organizations and civil society at large, members of the Permanent Forum and its secretariat. In December 2006, the Department of Economic and Social Affairs of the United Nations Secretariat invited written contributions on the follow-up to the fifth session and preparations for the sixth session of the Forum.

2. As at 9 March 2007, written submissions had been received from 18 United Nations and other intergovernmental entities, namely the Department of Economic and Social Affairs, the Economic Commission for Latin America and the Caribbean (ECLAC), the International Organization for Migration, the Office of the United Nations High Commissioner for Human Rights (OHCHR), the secretariat of the Convention on Biological Diversity, the United Nations Children's Fund (UNICEF), the United Nations Development Programme (UNDP), the United Nations Population Fund (UNFPA), the International Research and Training Institute for the Advancement of Women (INSTRAW), the United Nations Development Fund for Women (UNIFEM), the United Nations Human Settlements Programme, the Food and Agriculture Organization of the United Nations (FAO), the International Labour Organization (ILO), the United Nations Institute for Training and Research, the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Fund for Agricultural Development (IFAD), the World Food Programme (WFP) and the Department of Political Affairs, the latter two reporting for the first time. The Governments of Australia, Mexico, Spain and Switzerland and three non-governmental organizations in consultative status with the Economic and Social Council, namely the International Work Group for Indigenous Affairs, the Tebtebba Foundation and the Fundación Servicio de Paz y Justicia, also submitted reports.

3. The present report provides a general overview of contributions received and of the main activities of members of the Forum and its secretariat in promoting the implementation of the Forum's mandate and recommendations. A detailed database on the status of implementation of recommendations is posted on the secretariat website (www.un.org/esa/socdev/unpfii). The report also contains information on the Second International Decade of the World's Indigenous People, pursuant to the recommendation of the Permanent Forum at its fifth session.¹

4. The challenges identified by agencies in the implementation of the Forum's recommendations can be summarized as follows:

- (a) Insufficient human and financial resources;
- (b) Lack of flexibility in national programmes, broad diversity and geographical dispersion of indigenous groups and the ensuing difficulty of defining common programme strategies;
- (c) Issues of security hampering humanitarian assistance;

¹ *Official Records of the Economic and Social Council, 2006, Supplement No. 23 (E/2006/43), para. 128.*

(d) Governments' perception that the needs and rights of indigenous peoples are already included in public laws and policies and/or insufficient government commitment;

(e) Political sensitivity of the issue, including the publication of data;

(f) The great number of the Forum's recommendations and the need for their progressive realization, based on longer-term processes.

II. Developments under the mandated areas and special themes of the Permanent Forum, including the Millennium Development Goals

A. Economic and social development

5. Most of the written contributions from the United Nations system received for the sixth session of the Forum are linked to economic and social development. In the past year, there has been a visible trend towards bringing more awareness and action to indigenous peoples' issues at the operational level.

6. The increase in reports on the field activities of the United Nations system regarding indigenous peoples is a welcome development. In various cases, agencies have requested feedback from their field offices and are reporting it to the Forum, as is the case for UNDP, UNICEF and UNFPA. Not only is this a useful contribution to the Forum's capacity to ascertain progress and improve its dialogue with agencies; the preparation of reports in this manner also increases awareness of agency staff on indigenous issues, including on challenges, gaps and opportunities. In order to measure progress better, agencies were invited by the Department of Economic and Social Affairs to report on the number of programmes they devote to indigenous peoples' issues and estimate relevant budgetary allocations. The reports received provide some information in this regard, which will be used as a baseline to measure progress in the future.

Inter-Agency Support Group on Indigenous Issues

7. Since its inception, the Inter-Agency Support Group on Indigenous Issues has steadily supported the Forum, increasing awareness on indigenous issues and preparing papers annually for the Forum on complex issues, such as data collection and the Millennium Development Goals. From fewer than 10 in 2002, 30 intergovernmental entities are now members of the Group, including the Inter-American Development Bank, the Council of Europe and the Commonwealth Secretariat.

8. The annual meeting of the Group in September 2006 was hosted by IFAD and focused on the theme "Development with Identity", with three sub-items: (a) indigenous lands, territories and natural resources; (b) indigenous peoples and technology development/adoption; and (c) indigenous culture and development. The Permanent Forum members Victoria Tauli-Corpuz, Michael Dodson, Otilia Lux de Coti and Ida Nicolaisen also participated in the meeting. The annual report of the Group is contained in document E/C.19/2007/2.

United Nations Development Group

9. The revised guidelines for the common country assessment/United Nations Development Assistance Framework, finalized by the United Nations Development Group in February 2007, contain 15 references to indigenous peoples. Since the Framework is a mandatory programming process of all United Nations country teams, the continuous inclusion of references to indigenous peoples is crucial for the country teams in their operational work. With a view to assisting country teams in implementing the guidelines, the Inter-Agency Support Group on Indigenous Issues, functioning as task team of the United Nations Development Group, has been working since November 2006 under the mandate to develop, by the end of 2007, guidelines for country teams to integrate indigenous issues in United Nations operational activities.

10. One capacity-building initiative at the field level is a draft resource kit that will be finalized in 2007 for use by country teams.

United Nations country team in Ecuador

11. The United Nations country team in Ecuador continued its good example of coordination through its inter-agency working group on interculturalism. The country team submitted its second report (E/C.19/2007/3/Add.3) to the Forum.

Development account

12. The project entitled "Engaging indigenous women: local government capacity-building through new technologies in Latin America", under the fifth tranche of the Development Account is in the process of being launched by the secretariat of the Permanent Forum. The project, which will be conducted in partnership with local authorities and three indigenous peoples' organizations in Bolivia, Ecuador and Peru and in cooperation with INSTRAW, is to be implemented from June 2007 to December 2009.

Review of country reports on the Millennium Development Goals

13. Pursuant to the Forum's recommendation at its fifth session,² the secretariat of the Permanent Forum has continued to conduct desk reviews. A total of 11 national reports on the Millennium Development Goals were reviewed this year, with special emphasis on Latin America,³ as that region was not covered in the review of last year. The current review has lent added support to the findings of the previous review. The conclusions and recommendations of the review are set out below:

(a) Approximately 36 per cent of the reports reviewed sufficiently include indigenous issues (4 out of 11, namely Ecuador, Mexico, Panama, Venezuela

² Ibid., para. 152.

³ The reports reviewed are the latest available for each of the following 11 countries, ranging in date of publication from 2003 to 2005: Argentina (2003), Chile (2005), Costa Rica (2004), Ecuador (2005), El Salvador (2004), Honduras (2003), Mexico (2005), Panama (2005), Paraguay (2003), Peru (2004) and Venezuela (Bolivarian Republic of) (2004). Reports are available on the United Nations Development Group website at www.undg.org. The conclusions of the 2006 review of 25 national reports on the Millennium Development Goals is contained in a report to the Forum (E/C.19/2006/8). For the full text of the review, see the website of the secretariat of the Permanent Forum at www.un.org/esa/socdev/unpfii.

(Bolivarian Republic of)). Another 36 per cent address indigenous issues to varying degrees (Chile, Costa Rica, Honduras, Peru), while the remaining 28 per cent do not mention indigenous peoples at all (Argentina, El Salvador, Paraguay).

(b) With few exceptions, the reports were produced by Governments and the United Nations system without any reference to input from indigenous peoples' organizations. Exceptions include Peru, where an indigenous organization participated in working groups for the report; and Mexico, where the Comisión Nacional para el Desarrollo de los Pueblos Indígenas is listed as a contributing agency.

(c) Reports that address indigenous peoples tend to do so in the context of goals 1 (poverty and hunger), 2 (primary education), 3 (gender equality), 4 (child mortality) and 5 (maternal health). While most reports stated that indigenous peoples show a higher incidence of poverty, lower access to education and are more likely to suffer from maternal and child mortality and morbidity, few reports consistently provided data to support those statements. Reports showed considerable gaps in available data.

(d) With the exception of Honduras (regarding the Garífunas), none of the reports addressed the potential impact of HIV/AIDS on indigenous peoples.

(e) While several reports mentioned indigenous peoples under the water and sanitation component of goal 7, only Ecuador addressed participation of indigenous peoples in the management of natural resources.

(f) Only two of the reports reviewed (Mexico and Panama) referred to indigenous peoples in the context of meeting goal 8.

(g) Several reports did not specifically refer to indigenous peoples, but use regional and rural/urban disparities to describe disproportionate development. The most marginalized regions often correspond to indigenous lands and territories, although indigenous peoples are not explicitly mentioned (for example, the northern departments in Argentina, Sierra Rural and Selva Rural in Peru, Chiapas and Oaxaca states in Mexico). In addition, several reports included indigenous peoples in the grouping of "vulnerable populations" (such as extremely poor/low-income population, rural population, indigenous and other ethnic minorities, disabled), but did not provide specific data.

(h) Most reports discussed, to varying degrees, the exclusion and disparities affecting indigenous peoples, as well as targeted interventions to address those challenges (some explicitly, others in the category of "vulnerable populations"). However, with few exceptions, very little mention was made of mechanisms used to ensure the input and participation of indigenous peoples themselves in the design, implementation and monitoring of those policy interventions.

(i) Although most of the reports discussed the disparities affecting indigenous peoples, very few actually supported those claims with disaggregated data showing a detailed picture of their socio-economic situation. The main exception was Panama, which disaggregated most indicators into urban, rural non-indigenous and rural indigenous, although others, such as Chile, Ecuador, Mexico and Peru had indigenous-specific data for a few of the targets.

(j) States and cooperating United Nations agencies should incorporate the issues and challenges specifically faced by indigenous peoples directly into the

framework of the reports, by: (i) including indigenous peoples in the context of the overall report, including its planning; (ii) including indigenous peoples in the context of meeting each specific goal; (iii) including indigenous peoples' effective participation in the planning process of future interventions, as well as in the implementation, monitoring and evaluation of programmes and projects that will directly or indirectly affect them; and (iv) improving collection and disaggregation of data.

Review of Resident Coordinator reports

14. In 2006, the secretariat of the Permanent Forum carried out for the first time a desk review of 10 Resident Coordinator reports from 2001 to 2003.⁴ A review of select common country assessments and development assistance frameworks, in addition to the one conducted in 2006, is currently in preparation and will be ready before the sixth session. The review of Resident Coordinator reports represents part of the secretariat's ongoing efforts to inform the Forum and the United Nations system about indigenous issues and to ascertain progress made towards their integration at the field level. The following are the main conclusions and recommendations of the review:

(a) An analysis of indigenous issues is not necessarily present in common country assessments and development assistance frameworks even where indigenous peoples are a significant number in the country or strategically important on the national agenda. Even when the situation of indigenous peoples or ethnic groups is analysed in an assessment or a framework, it is not necessarily included in Resident Coordinator reports. This may be due to a number of variables, including the fact that Resident Coordinator reports are abbreviated documents designed to touch on macro-issues and highlight accomplishments of United Nations country programming at the framework outcome level. Nevertheless, when explicit references are made to indigenous peoples in the strategies and objectives of a development assistance framework, it is more likely that the Resident Coordinator report will also include such references.

(b) Disaggregated data and analysis of the situation of indigenous peoples in the common country assessment is crucial in developing programme strategies to address their problems.

(c) Adoption of a rights-based approach to a common country assessment development assistance framework facilitates a deeper analysis and linkages between issues, particularly the structural and underlying causes of poverty, exclusion or discrimination. The quality of participation of indigenous peoples' organizations affects the type of assessment and framework produced, which can then serve as a strong advocacy and implementation instrument and direct United Nations programming more clearly.

(d) The inclusion of references to indigenous issues in the assessment/framework guidelines in 2004 and other awareness-raising efforts are slowly making an impact at the country level. For example, while the 2001 report of

⁴ Countries included in the review were: Bangladesh (2001), Brazil (2003), Colombia (2003), Guyana (2003), India (2005), Kenya (2003), Nepal (2003), Peru (2001), Philippines (2003) and Uganda (2003). The reports are available on the United Nations Development Group website at www.undg.org.

the Resident Coordinator in Uganda hardly included any references to indigenous peoples, the 2004 assessment made many direct and indirect references to them, recommending, among other things, the involvement of indigenous peoples in conflict resolution, natural resources management, health and sanitation.

(e) Common country assessments and United Nations development assistance frameworks should provide a listing of partners involved in the preparatory process (like the one provided in the Kenya framework).

(f) United Nations country teams should develop working groups or theme groups on indigenous issues, where relevant (as in the case of Ecuador).

(g) United Nations country teams should develop public information and joint advocacy about the following:

(i) The recommendations emanating annually from the Permanent Forum, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people and other relevant international bodies;

(ii) The Second International Decade of the World's Indigenous People and its goals, objectives and Programme of Action;

(iii) The International Day of the World's Indigenous People (9 August).

B. Environment

Environment and traditional knowledge

15. The environment is the main focus of the sixth session theme "Territories, lands and natural resources". It also includes a number of important related issues, such as traditional knowledge, access and benefit-sharing, forests, climate change, environmental sustainability and desertification. The processes under the Convention on Biological Diversity, climate change and the United Nations Forum on Forests are among the most relevant in this field. Another area that requires increased attention from the Permanent Forum is the United Nations Convention to Combat Desertification and the draft protection measures relating to indigenous traditional knowledge.

16. The protection of indigenous peoples' traditional knowledge has been considered by a number of United Nations agencies, including the Convention on Biological Diversity and the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore of the World Intellectual Property Organization (WIPO). The Committee was established by the WIPO General Assembly in October 2000 as an international forum for debate and dialogue concerning the interplay between intellectual property and traditional knowledge, genetic resources and traditional cultural expressions (folklore). The linking of poverty and conservation continues to be a growing area of concern and activity.

17. In 2006, the secretariat of the Permanent Forum provided written comments for the WIPO draft provisions on the protection of traditional cultural expressions/expressions of folklore and the draft provisions on the protection of traditional knowledge, which have been developed by the Committee. In the written comments, it was pointed out that indigenous languages play a critical role in

keeping traditional knowledge alive and that what is under threat is not traditional knowledge itself, but the opportunities for young people to learn, practise and respect the knowledge production and practices of their elders.

18. The participation of indigenous peoples in the United Nations Forum on Forests continues to pose a challenge. In December 2006, an ad hoc expert group considered the content of a non-legally binding instrument on all types of forests. The draft composite text of the instrument will serve as the basis for negotiations at the seventh session of the Forum in April 2007. Indigenous peoples are mentioned briefly in a section on capacity-building and transfer of environmentally sound technologies with regard to their participation and empowerment in the development and implementation of forest management policies and programmes. However, some non-governmental organizations, such as the Forest Peoples Programme, have argued that it is not yet clear how the instrument would achieve the goal of conserving forests and providing better protection for the rights of indigenous peoples. The main concern about the instrument has been the inadequate inclusion of social justice and human rights issues and the restrictive participation practices for major groups in the Forum that fall behind best practices in other United Nations forums.⁵

19. The secretariat of the United Nations Framework Convention on Climate Change has been considering what can be done to reduce global warming and to cope with inevitable temperature increases. A number of States have approved an addition to the treaty, the Kyoto Protocol, which contains more powerful and legally binding measures. Within the Convention, indigenous peoples continue to advocate for the recognition of their human rights with regard to the impact of climate change on their customary practices, access to genetic resources, traditional knowledge and economic opportunities.

20. Work with the secretariat of the Convention on Biological Diversity continues on the protection of traditional knowledge and access and benefit-sharing of genetic resources. In January 2007, following the Forum's recommendation and the approval of the Economic and Social Council, an international expert group meeting was held on the international regime on access and benefit-sharing and indigenous peoples' human rights of the Convention on Biological Diversity. The presentations and discussions centred on:

- Human rights treaties and indigenous peoples' rights to lands, waters, territories and natural resources, including rights to genetic resources and traditional knowledge
- Human rights treaties and other existing or emerging instruments applicable to access and benefit-sharing processes
- Customary laws vested in traditional knowledge protection and transmission
- Indigenous participation in access and benefit-sharing processes
- A proposed certificate of origin, source or legal provenance for genetic resources
- The role of customary law in the protection of traditional knowledge and development of a regime on access to genetic resources and benefit-sharing.

⁵ See the briefing on the United Nations Forum on Forests at www.forestpeoples.org.

21. Victoria Tauli-Corpuz, Hassan Id Balkassm, Eduardo de Almeida, Pashuram Tamang, Ida Nicolaisen and Merike Kokajev attended the meeting (E/C.19/2007/8).

22. The Convention to Combat Desertification covers an area that relates strongly to indigenous peoples because of its programmes and projects aimed at involving the local communities to develop practical steps and measures to combat desertification in specific ecosystems. It is an area in which links with indigenous peoples' traditional knowledge systems could provide some understanding of environmental sustainability, because indigenous peoples have lived and sustained themselves in desert regions for millions of years.

Participation of Permanent Forum members in relevant meetings

23. Otilia Lux de Coti and members of the secretariat of the Permanent Forum attended the third session of the World Urban Forum held in Vancouver, Canada from 19 to 23 June 2006. At the Forum, they participated in many of the networking and round-table events, including a round table on indigenous peoples and the media, organized by the National Film Board of Canada and Indigenous and Northern Affairs Canada. It was the very first time that indigenous issues had been included in the World Urban Forum.

24. Wilton Littlechild, William Langeveldt and representatives of the Permanent Forum secretariat attended the international expert group meeting on urban indigenous people and migration, from 27 to 29 March 2007 in Santiago. The aims of the meeting, organized in accordance with a recommendation of the Permanent Forum in 2006, were (a) to assess the impact of the migration process on indigenous peoples; (b) to analyse living conditions and the human rights situation of indigenous peoples in urban areas with the aim of generating comprehensive data based on the latest research findings; (c) to evaluate current policies and practices and their effects on living conditions and the realization of the human rights of indigenous peoples in urban areas; and (d) to elaborate recommendations on how to improve the living conditions of urban indigenous peoples and to contribute to the realization of their human rights. The report of the meeting will be presented to the Forum.

25. Liliane Muzangi Mbella and Hassan Id Balkassm participated in the first world francophone indigenous congress in Agadir, Morocco, from 2 to 6 November 2006. The congress was attended by indigenous representatives of French-speaking countries and areas, including Quebec, North and West Africa, French Guyana and New Caledonia. Several workshops were organized to focus on issues such as land and resources, identity and language, education, environment and conflict resolution.

26. Indigenous peoples' participation is still a high priority in the environment area, particularly in the United Nations system. Better coordination is required with regard to issues such as traditional knowledge, access and benefit-sharing, sui generis systems and the impact of climate change and desertification on indigenous peoples and their communities.

27. One recommendation that the Permanent Forum could consider is mandating an expert meeting on indigenous peoples and the environment, with special emphasis on some of the less explored issues.

C. Education

28. The Forum promoted mother-tongue and bilingual education for indigenous children at its first five sessions by making substantive recommendations, including within the framework of Millennium Development Goal 2 on universal primary education. The findings of major studies and considerable research based on experiences of indigenous children and communities support the view of the Forum that mother-tongue education, coupled with the gradual introduction of bilingual and intercultural education, benefits children by affording more effective learning and access to higher education. Awareness of this issue is increasing in Governments and development donor agencies and countries. UNICEF and UNESCO have been undertaking a number of initiatives in various countries where indigenous children have access to culturally and linguistically sensitive education. The Forum could consider recommending that relevant United Nations agencies develop strategies for the systematic mainstreaming of mother-tongue and bilingual education in primary education for indigenous children.

29. The role of boarding schools for indigenous children has attracted considerable international attention. As the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people pointed out in his report, boarding schools have had a negative, even tragic impact. The Rapporteur gave examples of indigenous communities struggling to overcome the consequences of residential schools: entire generations of children had been removed from their families and placed in residential schools and the system had severely disrupted their families, cultures and identities (E/CN.4/2005/88/Add.3). Numerous cases have been heard of the grief suffered by indigenous peoples because of the loss of culture, identity and meaningful parenting that has marked community life as a result of the residential school experience, perhaps a factor leading to the high rate of suicide among Aboriginal adolescents. Legal claims have been filed and some dealt with through alternative dispute resolution mechanisms. Monetary compensation packages to victims have also been offered, although they do not really provide a meaningful response to language and culture loss.

30. In some regions of the world, some indigenous communities seem to accept the concept of boarding schools, which they perceive as an important step for the successful social integration of their children into mainstream society, although they recognize the dilemma of choosing between keeping children in community schools, where there is a clear lack of resources and qualified teachers, and sending them to boarding schools away from their communities. The situation is complex and the contexts are different from region to region and from country to country. The Forum could consider recommending in-depth comprehensive and comparative case studies on this subject with a view to drawing lessons learned for Governments when designing such educational systems so as to avoid adverse consequences in the future.

D. Health

31. The reports received indicate that United Nations agencies, notably UNICEF and UNFPA, continue to incorporate indigenous issues into their health programming at the country and regional levels, especially in terms of culturally sensitive approaches to health. The Forum should continue encouraging experience-

sharing in health programming for indigenous peoples among United Nations agencies working in the field.

32. Ms. Nicolaisen attended the Diabetes in Indigenous Peoples Forum in Melbourne, Australia, from 13 to 15 November 2006, where she delivered the keynote address on the subject "Curbing diabetes among indigenous peoples: a human rights approach". An article by Ms. Nicolaisen on indigenous peoples and diabetes was published in the journal *Diabetes Voice*.

33. Given the gravity of diabetes, it is important for the Permanent Forum to continue drawing attention to the problem and its effect on indigenous peoples, especially in terms of improved and disaggregated statistics, prevention and access to treatment. It will also be important for the World Health Organization (WHO) and the Joint United Nations Programme on HIV/AIDS (UNAIDS) to establish a systematic working relationship with the Permanent Forum and the Inter-Agency Support Group, especially given their role in the implementation of the Millennium Development Goals.

E. Culture

34. The Permanent Forum's recommendations on culture, but also all other areas of its mandate, have included indigenous peoples' holistic visions and perspectives. It is also noteworthy that 17 articles of the draft United Nations declaration on the rights of indigenous peoples essentially refer to culture. How to integrate such cultural perspectives in all the areas of work of the United Nations system constitutes a major focus for the Forum when addressing recommendations on culture, in addition to those specifically focusing on heritage, languages and other aspects. The United Nations system has much to learn from indigenous peoples in terms of considering collectivity, participation and community-based approaches to development.

35. Among the United Nations agencies, UNICEF and UNFPA have been engaged in training their staff on a culturally sensitive approach to education and reproductive rights and have shared their experiences and good practices at both the country and regional levels in their annual reports to the Forum. In both agencies, policy guidelines on inclusiveness and integration of a culturally sensitive approach in accordance with international human rights standards are crucial for country programming. The Forum could consider recommending that those agencies document, publish and widely distribute these good practices, in cooperation with indigenous peoples' organizations, so that these practices may be replicated and inspire other agencies and Governments.

F. Human rights

36. The 2007 report of OHCHR submitted to the Forum is comprehensive in responding to the Forum's recommendations. In 2006, OHCHR organized an important workshop on indigenous peoples in voluntary isolation. The Forum has expressed its concern at previous sessions about the situation of indigenous peoples in voluntary isolation and has called on the United Nations system to develop strategies and programmes for the protection of their rights and territories.

37. International efforts to include indigenous peoples in standard-setting work at the United Nations have found resonance in the new Convention on the Rights of Persons with Disabilities, adopted by the General Assembly on 13 December 2006 in its resolution 61/106. Indigenous people with disabilities are mentioned in subparagraph (p) of the Preamble of the Convention.

38. At its fifth session, the Forum mandated a paper on how it could implement its mandate in the area of human rights without duplicating the work of other human rights bodies and mechanisms. The report prepared by Ms. Tauli-Corpuz provides thoughtful insights that constitute a good basis of discussion for the Forum on that matter.

39. Ms. Muzangi Mbella participated in the seminar on "Indigenous rights: instruments and good practices", in Yaoundé, from 27 November to 1 December 2006. Participants were from French-speaking countries of Central Africa, including Burundi, Cameroon, the Central African Republic, the Congo and Gabon. The issues discussed included the identification of indigenous peoples and their challenges and priorities in the realization of the Millennium Development Goals, subregional specificities and challenges, the integration of ILO Convention No. 169 into programming work and how to link subregional networks to international processes.

40. The draft declaration on the rights of indigenous peoples was adopted by the Human Rights Council in June 2006. At its sixty-first session, the General Assembly deferred consideration and action on the declaration for further consultations with the aim of concluding consideration before the end of its current session in September 2007.

G. Awareness-raising, information and production of material

Events

41. The Forum secretariat organized or co-organized 35 multi-stakeholder events in 2006. In addition, at the fifth session of the Permanent Forum, the secretariat coordinated 40 other events.

42. At the commemoration of the International Day of the World's Indigenous People at Headquarters in New York on 9 August 2006, a panel discussion was organized on the theme "Indigenous peoples: human rights, dignity and development with identity", as were a cultural event and an art exhibit. Statements for the Day were issued by the Secretary-General, the Chairperson of the Permanent Forum and the Under-Secretary-General for Economic and Social Affairs and Coordinator of the Second International Decade of the World's Indigenous People.

43. To promote the presence and visibility of indigenous peoples during the discussions of the General Assembly, the Forum secretariat organized a dialogue and panel discussion entitled "Towards implementing the United Nations Declaration on the Rights of Indigenous Peoples", sponsored jointly by the Permanent Missions of Mexico and Peru to the United Nations and OHCHR; and a panel discussion and launch of the report, "Mairin Iwanka Raya, Indigenous Women Stand against Violence", co-organized with the International Indigenous Women's Forum and the international human rights organization MADRE.

44. A delegation of indigenous leaders from various regions, the Chairperson of the Permanent Forum and the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people met with the President of the General Assembly on 20 October 2006 to discuss the draft declaration.

45. A briefing on the draft declaration was organized jointly by the Permanent Missions of Denmark, Mexico, Norway, Peru and Spain and co-sponsored by the Forum secretariat.

46. Two press conferences were organized by Forum secretariat and co-sponsored by the Permanent Mission of Mexico to discuss the draft declaration, its history, significance and current status and to hear the views of indigenous leaders and human rights advocates on the declaration.

Logo competition for indigenous children and youth

47. In order to promote greater awareness of the Forum and the United Nations among indigenous children and youth, the Forum, at its second session, organized an indigenous youth art competition for the design of a logo for the Forum. The Forum secretariat received a total of 148 entries from around the world.

48. The Bureau of the Permanent Forum has chosen the artwork of Rebang Dewan, a 12-year-old Chackma child from Bangladesh, as the visual identifier of the Forum.

Material produced

49. The Forum secretariat annually produces four internal newsletters addressed to Permanent Forum members and four public newsletters in English. A Spanish translation of some issues has been provided thanks to the cooperation of UNICEF. Translation of the newsletter into other languages is necessary. The newsletter highlights the activities of the Forum, its secretariat and some news from field offices. The public newsletter is available at www.un.org/esa/socdev/unpfii/en/newsletter.html.

50. The Forum secretariat, in cooperation with the Department of Public Information, has also been producing material for dissemination such as flyers, media advisories, fact sheets and press releases for different activities and events.

51. The new website of the Forum secretariat, launched in March 2006, is running in English and Spanish, while content has now been added in French and Russian. It is an important information and communication tool about the Permanent Forum and other activities related to the United Nations. Translation and updating of website contents in official languages remains a major challenge.

52. As a tribute to the thirty-fifth anniversary of the launch of the United Nations study of the problem of discrimination against indigenous populations, the Forum secretariat is making the study available on its website. The report, commonly known as the Martinez Cobo report, was not previously available in electronic form.

53. A 30-minute film, *Indigenous peoples and the United Nations Vol. I*, in English, French and Spanish, produced by the Forum secretariat, was distributed to United Nations country offices, United Nations information centres and Governments with the purpose of promoting the integration of indigenous issues into their work and providing general information on the Permanent Forum. On

2 February 2007, the film received the 2007 finalist award from the New York Festivals in the International Film and Video category. The award recognizes the world's best work in informational, educational and industrial film productions and corporate videos. The 2007 awards received entries from over 41 countries around the world. The film can be downloaded from the website at www.un.org/esa/socdev/unpfii/en/multimedia.html, or copies may be obtained from the Forum secretariat.

State of the World's Indigenous People

54. The Forum secretariat has responded to a recommendation made by the Forum at its first session for the production of a publication on the state of the world's indigenous people. Work on the first issue of the publication is under way. In preparation for the publication, an expert group meeting was held in Salekhard, Russian Federation, in December 2006. The meeting was attended by Forum members Pavel Sulyandziga and William Langeveldt, besides the authors of the publication and other participants. The work is scheduled for publication in 2008.

H. Promotion of integration and coordination of indigenous issues

55. Considerable and indeed increasing inter-agency work on indigenous issues is being conducted through the Inter-Agency Support Group, the United Nations Development Group and the Inter-Agency Network on Women and Gender Equality (see also sections A and J). In addition, the Intradepartmental Task Force on Indigenous Issues of the Department of Economic and Social Affairs has continued to bring together relevant Divisions of the Department in certain common actions, including a plan of action for the Second International Decade of the World's Indigenous People.

56. The Forum secretariat and the Division for Public Administration and Development Management are promoting an interdivisional project on issues related to the institutional capacity of local governments led by indigenous authorities. The project proposal has been sent out to gauge the interest of potential donors.

I. Indigenous children and youth

57. Indigenous children are specifically mentioned in the Convention on the Rights of the Child:

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.⁶

58. It is obvious from various United Nations and other reports that the majority of indigenous youth and children do not enjoy the rights set out in the Convention and continue to live below the poverty line, whether in developed or developing countries. The country reports of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people provide an overview of the

⁶ General Assembly resolution 44/25, annex, article 30.

marginalization and vulnerable situation of youth and children, including social indicators suggesting lack of access to education, health and housing services, over-representation in the youth justice system and involuntary displacement due to military conflict. It is also obvious that where indigenous men and women are at risk, their children may also be at risk.

59. In many countries, the existing social housing units for indigenous peoples are among the oldest, smallest and most crowded. Severe housing shortages adversely affect youth and children through related intrafamily abuse and violence. In many instances, a high proportion of indigenous youth and children are placed in the care of child and family services. Higher rates of suicide are evident in indigenous communities in comparison with other members of society and are often thought to be related to family dysfunction and social disorganization associated with a history of discrimination and marginalization. In some countries, the leading cause of death among indigenous children and youth is suicide. In one region in a developed country, the suicide rate among indigenous youth is 10 times higher than the national average (E/CN.4/2005/88/Add.3, annex, para. 40).

60. According to the Special Rapporteur, in regions of military conflict, the main tactics used to subjugate indigenous peoples include indiscriminate bombings, killings, arbitrary and unlawful detention, roadblocks, burning of houses, looting and theft of animals, damage to sacred sites, theft of medical equipment and damage to health centres, and theft of educational materials and damage to schools. There are also high rates of malnutrition among displaced indigenous peoples, and even cases of children dying of hunger. Surrounding municipalities are struggling to meet the needs of displaced indigenous peoples and, in many instances, women have become the heads of their household; it is they and their children who suffer the worst consequences of involuntary displacement. For example, many of the women resort to begging and a large number of the children live in the streets. Suicide among indigenous youth is often attributed to the collective depression caused by the horrors of armed conflict (E/CN.4/2005/88/Add.2, sect. III, paras. 25 and 39).

61. United Nations reports on issues relating to children and young people often do not provide specific data on indigenous children and youth. This is largely due to the fact that very few countries collect reliable disaggregated data on the status of indigenous peoples. Fewer keep data specifically about indigenous youth. There are a number of reasons for this, including the fact that no priority is given to the status of indigenous children and youth and that, in many cases, there is an unwillingness to recognize their indigenous identity. Hence, it is difficult in some instances to obtain information on efforts to increase knowledge about HIV among young people and whether adequate care and support is being provided for the million children orphaned by AIDS and for millions of other children made vulnerable by the epidemic in some regions.

62. Indigenous youth and children residing in urban areas are often portrayed in a way that sensationalizes problems such as destructive behaviour or risk-prone lifestyles. There is often very little understanding of the communal and kinship ties that often exist in these settings. Hence, youth living in an urban environment are often still living within a "community" and have connections and relations with members within that community. The indigenous peoples in that community may not be of the same language group or from the same territories, but they have respect and knowledge of the nuances, protocols and practices peculiar to their place

of living. Meaningful activities that achieve positive outcomes for youth are empowering and need to provide opportunities for the development and affirmation of cultural identity, cultural knowledge and skills. For example, cultural activities in the form of drama, music and art are increasingly being used to raise awareness about relevant social concerns and to help youth to speak out on issues that affect them, such as racism.

63. Youth also see the environment as an important issue. At the second International Indigenous Youth Conference, several of the resolutions and declarations adopted were aimed at stopping the destructive impact of globalization on indigenous lands, cultures and peoples. The 6-day meeting facilitated dialogue among indigenous young people from countries in Africa, Asia, Latin America, the Pacific, North America and Europe. Over 180 delegates gathered on Coast Salish territory in Vancouver, Canada, to share experiences and create a plan of action. In the final declaration, the conference representatives called for an end to all developmental aggression, such as destructive dams, logging, and mining on or near indigenous lands and territories.

64. The Permanent Forum has actively contributed to the development of a general comment on indigenous children and their rights, to be presented to the Committee on the Rights of the Child. Ms. Nicolaisen participated in a meeting with the lead authors in February 2007. Following up on the general comment and its implementation should be a priority for the Forum in its work on indigenous children and youth.

65. The Forum secretariat contributed to the United Nations World Youth Report 2007 with a special section on indigenous youth and Latin America, highlighting a number of challenges that exacerbate the vulnerability of indigenous youth and actions that are needed to address the issues faced by indigenous youth in Latin America.

66. UNICEF and UNFPA have reported on their initiatives on indigenous children and youth. UNFPA has advocated for the inclusion of indigenous youth in national youth policies in Ecuador, Guatemala and Panama. UNICEF has pursued participatory studies on the situation of indigenous children in several countries, and supported bilingual and intercultural education projects and culturally sensitive approaches to maternal and child health.

67. The Permanent Forum should explore ways to host an international meeting on indigenous youth suicide, which is reaching crisis proportions.

J. Indigenous women

Task Force on Indigenous Women

68. The Task Force on Indigenous Women of the Inter-Agency Network on Women and Gender Equality, established in 2004, is composed of 17 United Nations entities and chaired by the Forum secretariat. In 2005 and 2006, the Task Force collected 18 case studies submitted by the secretariat of the Convention on Biological Diversity, FAO, IFAD, ILO, UNFPA, UNIFEM and UNDP about their work with indigenous women in Africa, Asia and Latin America. A publication containing the case studies, entitled "Indigenous Women and the United Nations System", will be launched at the sixth session of the Forum. Following the Forum's call for the dissemination of good practices, the publication will be widely

distributed so that it may serve as a practical tool for future work of the United Nations system and other organizations engaging with indigenous peoples.

Commission on the Status of Women

69. In February 2007, at the fifty-first session of the Commission on the Status of Women, Ms. Kokajev, on behalf of the Chairperson of the Permanent Forum, addressed the theme "The elimination of all forms of discrimination and violence against the girl child". Ms. Kokajev articulated the concerns and aspirations of indigenous women and girls and appealed to the Commission to monitor the status of implementation of Commission resolution 49/7 entitled "Indigenous women: beyond the 10-year review of the Beijing Declaration and Platform for Action".⁷

70. The Forum secretariat in collaboration with MADRE, the International Indigenous Women's Forum, the Center for Women's Global Leadership and Amnesty International — Stop Violence against Women campaign, sponsored a special event on violence against women.

Gender and statistics

71. The Forum secretariat attended the seventh International Meeting on Gender Statistics within the framework of the Millennium Development Goals, from 19 to 21 September 2006, in Aguascalientes, Mexico. The meeting was organized by UNIFEM, ECLAC, the National Institute of Women of Mexico (Inmujeres) and the Instituto Nacional de Estadística, Geografía e Informática of Mexico. The secretariat addressed recommendations made by the Forum at its third, fourth and fifth sessions linking indigenous women and data collection and disaggregation and presented activities being conducted on data, indicators and gender issues. It also conveyed the urgent need to include indigenous peoples in statistics, including indigenous women.

Third meeting of United Nations agencies and indigenous women's organizations of Central America and Mexico

72. On 21 and 22 June 2006, Lux de Coti and members of the Forum secretariat participated in the third meeting of United Nations agencies and indigenous women's representatives of Central America and Mexico, organized by UNIFEM and the Indigenous Women's Network of Central America. Some 30 indigenous representatives from Guatemala, Honduras, Mexico, Nicaragua and Panama participated, as well as representatives of 10 United Nations agencies, including UNICEF, UNESCO, the Pan American Health Organization, UNDP and OHCHR. A plan of action was developed by the participants, in which the main focus was the creation of a capacity-building programme for indigenous women of the region with the support of UNIFEM and universities.

K. Data collection and disaggregation

73. In the light of the importance that the Forum has placed on data collection and disaggregation, three regional meetings have been organized by the Forum

⁷ *Official Records of the Economic and Social Council, 2005, Supplement No. 7 (E/2005/27), chap. I.D, para. 4.*

secretariat since the fifth session of the Forum to develop specific indigenous indicators of well-being and poverty. The meetings were held in Africa (Nairobi), Asia (Baguio, Philippines) and Latin America and the Caribbean (Puerto Cabezas, Nicaragua). A meeting regarding indicators and indigenous peoples in developed countries was held in March 2006, in Ottawa. The outcomes of the meetings will be included in conference room papers to be submitted to the Forum and presented at its sixth session.

74. Data-related activities have been conducted in Latin America regarding, in particular, indigenous women. An account of relevant meetings held since the fifth session of the Forum appears under the section on women above.

75. The Statistics Division of the Department of Economic and Social Affairs has continued to disaggregate census data on its website, and UNICEF and ECLAC have reported data-related work.

76. As can be seen from the present report, despite some progress, data collection and disaggregation regarding indigenous peoples continues to remain a challenge in all the mandated areas of the Permanent Forum.

III. Trust Fund on Indigenous Issues

77. Pursuant to General Assembly resolutions 57/191 and 59/174, the Trust Fund on Indigenous Issues supports the Permanent Forum and the projects and programmes of the Second International Decade of the World's Indigenous People.

78. In 2006, the Trust Fund received contributions from Cyprus, Finland, Mexico and IFAD for the funding of activities related to the Permanent Forum. Finland earmarked an amount towards the development of a fellowship programme by the Forum secretariat, and IFAD allocated its entire contribution to support the Forum's programme on indigenous people and indicators of poverty and well-being. The Trust Fund also received a public donation. The total amount of contributions received in 2006 relating to the activities of the Permanent Forum amounted to \$227,788.

79. In 2006, the Fund supported 14 trips of Forum members to meetings of relevance to the Forum's mandate. These missions provided the opportunity for members to raise awareness and promote integration and coordination of activities relating to indigenous issues.

80. The Fund supported the provision of translation services at the fifth session of the Permanent Forum for in-session documents and side events and for the translation from English into French and Russian of a Forum secretariat handbook that provides practical and background information.

81. The Fund also supported cultural events in connection with the commemoration of the International Day of the World's Indigenous People on 9 August and at the fifth session of the Forum.

82. On the basis of the IFAD grant for the Forum programme on indigenous peoples and indicators of poverty and well-being, three regional consultations with indigenous experts were held in Africa, Asia and Latin America to capture indicators of indigenous peoples' poverty and well-being and to present a summary of the results to the Permanent Forum at its sixth session.

83. From the contributions allocated by UNDP, the Fund supported a project on data collection and disaggregation in Nepal based on the 2001 census. Undertaken by Nepal Tamang Ghedung, an indigenous Nepalese organization, together with consultants and a steering committee member from the Central Bureau of Statistics, the project has now been completed.

84. The handbook of the International Work Group for Indigenous Affairs on the Permanent Forum has now been published in Russian and distributed to indigenous organizations and representatives in the Russian Federation.

85. The fellowship programme of the Forum secretariat, requested by the Permanent Forum, has not yet materialized owing to a lack of funds.

86. In connection with the Second Decade, in 2006 the Trust Fund received contributions from Algeria, Chile, Cyprus, Ecuador, Estonia, Mexico and Peru, as well as from the Comisión Nacional para el Desarrollo de los Pueblos Indígenas of Mexico. The balance of earmarked contributions from the first Decade, in agreement with the donors Algeria, Canada, Denmark, Estonia, Japan and the Libyan Arab Jamahiriya, was transferred to the Fund. Thus, the total amount of funds received for the activities relating to the Second Decade was \$270,159. Following the recommendations of the Permanent Forum Bureau in May 2006 regarding small grants, the Department of Economic and Social Affairs processed 21 such grants.

IV. Second International Decade of the World's Indigenous People

87. A significant achievement in the first years of the Second International Decade of the World's Indigenous People is the increased involvement of Member States, United Nations agencies and non-governmental organizations in indigenous issues. In April 2006, the Coordinator of the Second Decade and Under-Secretary-General for Economic and Social Affairs transmitted the Programme of Action for the Decade and asked for constructive action in relation to it. A total of 22 responses were received, mainly from United Nations agencies,⁸ with some promising plans. Substantive responses were also received from the Governments of Greece, Panama and Spain, outlining their plans and policies. It is also noteworthy that intergovernmental organizations outside the United Nations system have been increasingly engaged in indigenous issues. Responses to letters from the Coordinator were received from the Organization of American States, the Asian Development Bank, the Inter-American Development Bank and the Council of Europe. The Department of Economic and Social Affairs produced a plan of action for the Decade on the basis of cooperation among six divisions aiming at mainstreaming the objectives of the Decade in the work of the Department in the areas of statistics and population censuses, public administration, youth, women, sustainable development and the work of the United Nations Forum on Forests.

88. The Decade has also catalysed the action of the United Nations Development Group as a whole. Following an initiative of the Coordinator, the Development

⁸ OHCHR, UNDP, ILO, UNIFEM, FAO, WHO, UNFPA, the Department of Public Information, UNESCO, WFP, the Economic and Social Commission for Western Asia, UNAIDS, the secretariat of the Convention on Biological Diversity, the International Monetary Fund, the World Trade Organization and WIPO.

Group transmitted the Programme of Action for the Decade to all United Nations country teams so that they could integrate it into their work. In addition, the Development Group decided to launch a comprehensive effort for the systematic integration of indigenous issues in the field by initiating the elaboration of guidelines for the teams as well as of an action plan that will enhance their capacity in that area.

89. The Forum secretariat has not received a critical enough mass of responses regarding the Decade in order to be able to ascertain all progress made towards its goal, objectives and Programme of Action. In the reports received for the sixth session, 7 of the 18 reports received as at 10 March 2007 made such references, pointing out that the activities of the agency on indigenous issues contributed to the implementation of the goal, objectives and Programme of Action of the Decade.

90. An analysis of the responses received also showed that the challenges that various actors point out in terms of implementation are limited human and financial resources. This is understandable, as the governmental and intergovernmental sectors, indigenous organizations and other sections of civil society are invited to address the rich policy recommendations emanating from (a) the Permanent Forum; (b) the General Assembly, as far as the Decade is concerned; (c) the Special Rapporteurs; and (d) human rights treaty bodies. It is important to consider, however, that many of those recommendations and the objectives of the Decade are complementary and are not necessarily about providing more resources, but about changing the way of delivering programmes, especially in terms of promoting non-discrimination and inclusion, full and effective participation of indigenous peoples, culturally appropriate development and the establishment of strong monitoring mechanisms (namely, objectives i, ii, iii and v of the Decade).

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**Implementation of recommendations on the six mandated
areas of the Forum and on the Millennium Development Goals**

**Report of the Secretariat on Indigenous traditional
knowledge*****Summary*

At its fifth session in May 2006, the Permanent Forum on Indigenous Issues, taking into account the recommendations of the International Technical Workshop on Indigenous Traditional Knowledge (E/C.19/2006/2, para. 41) regarding a study on customary laws pertaining to indigenous traditional knowledge, decided to appoint Michael Dodson as Special Rapporteur charged with preparing, within existing resources, a concept paper on the scope of the study that would investigate to what extent such customary laws should be reflected in international and national standards addressing traditional knowledge, and requested the Special Rapporteur to report to the Permanent Forum at its sixth session on the matter. The study would include an analysis of indigenous customary law as a potential sui generis system for protecting indigenous traditional knowledge. Relevant organizations of the system should collaborate to promote, in national legislation and policies, respect for and recognition of the customary legal systems of indigenous populations pertaining to indigenous knowledge, as well as their application.

* E/C.19/2007/1.

** Submission of the present report was delayed in order to ensure the inclusion of the most recent information.



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I. Introduction

1. For many years, indigenous people have expressed concern about the inadequate protection of their traditional knowledge. Although this concern has not gone unheeded, the issue remains unresolved. The challenge that confronts the international community is to determine how the overall lack of protection of indigenous peoples' traditional knowledge should be remedied.

2. "Indigenous traditional knowledge" is used in the present report in general terms to mean traditional practices and culture and the knowledge of plants and animals and of their methods of propagation; it includes expressions of cultural values, beliefs, rituals and community laws, and it includes knowledge regarding land and ecosystem management. It is more often unwritten and handed down orally from generation to generation, and it is transmitted and preserved in that way. Some of the knowledge is of a highly sacred and secret nature and therefore extremely sensitive and culturally significant and not readily publicly available, even to members of the particular group. The preceding is the understanding upon which this paper is based. It is not meant to be an all-encompassing, comprehensive definition of the subject matter.

3. Since its establishment in 2000, the Permanent Forum on Indigenous Issues has made a number of recommendations calling for traditional knowledge to be addressed as a matter of urgency.¹ Recognizing that numerous United Nations and intergovernmental bodies were already actively engaged in ways to remedy the inadequate protection of indigenous traditional knowledge, an international technical workshop was convened in Panama City in September 2005 to bring together indigenous experts and United Nations agencies.² The International Technical Workshop on Indigenous Traditional Knowledge (henceforth referred to as the Workshop) discussed issues surrounding the protection of indigenous traditional knowledge, including approaches taken by different agencies, and made numerous recommendations. Recognizing the relationship between indigenous traditional knowledge and customary laws, the Workshop recommended that the Permanent Forum commission a study on "customary laws pertaining to indigenous traditional knowledge in order to investigate to what extent such customary laws should be reflected in international and national standards addressing indigenous traditional knowledge".³

II. Overview of the current situation

4. There are a variety of documents, systems and activities that currently seek to address the lack of protection of indigenous traditional knowledge at national, regional and international levels. It is not necessary to provide an exhaustive list of the existing methods of protection for the purposes of the present report; however, an understanding of the more significant documents, systems and activities is crucial to understanding the nature of the issue and the environment in which a study

¹ See PFII/2005/WS.TK, annex I. Available from http://www.un.org/esa/socdev/unpfii/documents/workshop_TK_background_note.pdf.

² See *Official Records of the Economic and Social Council, 2005, Supplement No. 23 and corrigendum (E/2005/43 and Corr.2)*.

³ E/C.19/2006/2, para. 41.

commissioned by the Permanent Forum would be located. An increased awareness of the current environment will also assist in determining exactly what is needed from such a study.

5. The right of indigenous peoples to protect and enjoy their traditional knowledge is recognized in a number of international instruments, including the following:

- (a) Article 27 of the Universal Declaration of Human Rights;⁴
- (b) Article 15, paragraph 1 (c), of the International Covenant on Economic, Social and Cultural Rights;⁵
- (c) Article 27 of the International Covenant on Civil and Political Rights;⁵
- (d) Article 8 (j) of the Convention on Biological Diversity;⁶
- (e) International Treaty on Plant Genetic Resources for Food and Agriculture;⁷
- (f) Articles 13, 15 and 23 of International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries;
- (g) Berne Convention for the Protection of Literary and Artistic Works, as amended in 1979;
- (h) Agreement on Trade-Related Aspects of Intellectual Property Rights;⁸
- (i) Article 3 of the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa;⁹
- (j) Paragraph 12 (d) of the Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests;¹⁰
- (k) Paragraph 26.1 of Agenda 21;¹¹
- (l) WHO traditional medicine strategy, 2002-2005;¹²
- (m) Principle 22 of the Rio Declaration on Environment and Development;¹³

⁴ Resolution 217 A (III).

⁵ Resolution 2200 A (XXI), annex.

⁶ United Nations, *Treaty Series*, vol. 1760, No. 30619.

⁷ Food and Agriculture Organization of the United Nations, *Report of the Conference of FAO, Thirty-first Session, Rome, 2-13 November 2001* (C 2001/REP), appendix D.

⁸ See *Legal Instruments Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, done at Marrakesh on 15 April 1994* (GATT secretariat publication, Sales No. GATT/1994-7).

⁹ United Nations, *Treaty Series*, vol. 1954, No. 33480.

¹⁰ *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992*, vol. 1, *Resolutions Adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution 1, annex III.

¹¹ *Ibid.*, annex II.

¹² WHO/EDM/TRM/2002.1 (Geneva, World Health Organization).

¹³ *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992*, vol. 1, *Resolutions Adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution 1, annex I.

(n) Articles 11 and 31 of the draft United Nations Declaration on the Rights of Indigenous Peoples.¹⁴

6. In addition to the above-mentioned texts and international instruments, there are numerous regional systems of protection, including the Draft American Declaration on the Rights of Indigenous Peoples of the Organization of American States; the Bangui Agreement of the African Intellectual Property Organization; the Tunis Model Law on Copyright for Developing Countries; and the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions. Other declarations include the Mataatua Declaration and the Kari-Oca Declaration.

7. At the national level, there are a multitude of legislative and policy initiatives aimed at addressing the issue of indigenous traditional knowledge. The following examples from several different States, which address environmental, health, medicinal and intellectual property aspects of traditional knowledge, illustrate the diversity of those approaches. A comprehensive list of legislative texts directed at the protection of traditional cultural expression can be found on the website of the World Intellectual Property Organization (WIPO).¹⁵

8. In Australia, environmental protection regulations recognize the special knowledge held by indigenous persons about biological resources.¹⁶ The guidelines prepared by the Government of Australia for natural resource management recognize that indigenous peoples have links to the land and sea that are historically, spiritually and culturally strong and unique.¹⁷ In the Northern Territory of Australia, traditional medicinal knowledge is partially recognized through the utilization of aboriginal health workers, who act as a bridge between traditional healers, indigenous communities and conventional medical practitioners.¹⁸

9. In Canada, health practices are regulated through legislative means at the federal and provincial levels, and some provincial laws specifically recognize aboriginal healing practices.¹⁹ The Canadian *Environmental Assessment Act, 1992*, provides for the consideration of aboriginal traditional knowledge in conducting an environmental assessment.²⁰ Canada also utilizes aboriginal skills under its National Forestry Strategy 2002-2008 and the certification system for national forest management.²¹

10. In South Africa, the *Traditional Health Practitioners Act, 2004*, recognizes and regulates the practice of traditional medicine in that country. The South African *National Environmental Management Act, 1998*, directs decision makers on environmental matters to take into account all forms of knowledge, including traditional knowledge. Another example is Bolivia, where a national system of

¹⁴ See General Assembly resolution 61/178 of 20 December 2006, annex.

¹⁵ Available from <http://www.wipo.int/tk/en/laws/folklore.html>.

¹⁶ *Environmental Protection and Biodiversity Conservation (Amendment) Regulations (No. 2) 2005*, part 8A.01(c).

¹⁷ See <http://www.nrm.gov.au/indigenous/index.html>.

¹⁸ See *Health Practitioners and Allied Professionals Registration Act 1985*.

¹⁹ See *Health Act*, chap. 106. Available from <http://www.gov.yk.ca/legislation/acts/health.pdf>.

²⁰ Section 16.1.

²¹ For additional information see <http://www.for.gov.bc.ca/tasb/MANUALS/Policy/resmngmt/rm15-1.htm>.

protected areas has been established under Supreme Decree No. 24122 of 1995, wherein traditional knowledge is acknowledged and used in management practice.

11. Ecuador recognizes the practice of traditional medicine in its national Constitution. In the Philippines, traditional medicinal practices are recognized by law. Section 4.(b) of the *Traditional and Alternative Medicine Act (TAMA) of 1997* defines traditional medicine as “the sum total of knowledge, skills and practice on health care, not necessarily explicable in the context of modern, scientific philosophical framework, but recognized by the people to help maintain and improve their health towards the wholeness of their being, the community and society, and their interrelations based on culture, history, heritage and consciousness”.²² In India, the World Health Organization worldwide review indicated that 70 per cent of the rural population depended on the Ayurvedic system of traditional medicine practices. The Government of India regulates traditional medicinal knowledge through the *Indian Medicine Central Council Act*.

12. Protection via intellectual property law in Nigeria is provided under the *Copyright Act, 1990*, which seeks to protect traditional folk law. Article 28, paragraph 5, defines folklore as “a group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an inadequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means”.²³ The Central African Republic copyright law defines folklore as all literary and artistic productions created by the national communities, passed on from generation to generation and constituting one of the basic elements of the traditional cultural heritage.²⁴ In Ghana, the copyright law seeks to protect traditional folklore under the *Copyright Act, 2005*, although its introduction was met with some controversy.

13. In many instances, domestic laws recognize indigenous customary law as the foundation of the relevant indigenous peoples’ rights to land and heritage. Comprehensive coverage of such issues will be a matter of central concern to the scope of any study the Permanent Forum may choose to pursue.

14. In relation to provisions in international documents, various levels of protection are offered that are principally either protection as an aspect of human rights law or protection that specifically addresses indigenous traditional knowledge. Examples of human rights-based protection are found in article 27, paragraph 2, of the Universal Declaration of Human Rights⁴ and in article 15, paragraph 1 (c), of the International Covenant on Economic, Social and Cultural Rights;⁵ the former recognizes that everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author; the latter, that everyone has the right to take part in cultural life. In relation to indigenous traditional knowledge, however, the protection provided by such a provision is limited. This can be illustrated by considering the problematic notion of “author”, which evokes an understanding of an individual and does not easily encompass communal creation and ownership.

15. An example of a more specific provision relating to indigenous traditional knowledge is article 8 (j) of the Convention on Biological Diversity.⁶ Article 8 (j)

²² Available from <http://www.stuartxchange.org/TAMA.html>.

²³ See <http://www.nigeria-law.org/CopyrightAct.htm>.

²⁴ Ordinance No. 85-002 on Copyright (Central African Republic) art. 9.

calls upon parties to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities that embody traditional lifestyles relevant for the conservation and sustainable use of biological diversity. Although article 8 (j) directly considers indigenous traditional knowledge, it is limited to situations where traditional knowledge is relevant to biological diversity and is simply not designed to provide holistic protection for indigenous traditional knowledge.

16. Arguably the most explicit provision for the protection of indigenous traditional knowledge is contained in the draft United Nations Declaration on the Rights of Indigenous Peoples²⁵ (draft Declaration), which currently awaits consideration by the General Assembly. Despite its present status, the draft Declaration provides a strong and persuasive statement in support of the protection of indigenous traditional knowledge. Article 31, paragraph 1, of the draft Declaration states the following:

“Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.”

17. Importantly, paragraph 2 of article 31 states that States “shall take effective measures to recognize and protect the exercise of these rights”. Article 11 of the draft Declaration emphasizes the right to practise and revitalize cultural traditions and customs and states that States shall provide redress through effective mechanisms, with regard to indigenous, cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs. The preamble of the draft Declaration also adds support to the protection of indigenous traditional knowledge by recognizing “that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment”.²⁶

18. Although international, regional and national documents do provide some protection for indigenous traditional knowledge, they fail to provide comprehensive protection. There are a number of United Nations agencies and intergovernmental organizations that are currently engaged in activities aimed at addressing this inadequate protection, including the World Intellectual Property Organization, the United Nations Development Programme (UNDP), the United Nations Conference on Trade and Development (UNCTAD), the Food and Agriculture Organization of the United Nations (FAO), the Conference of the Parties to the Convention on Biological Diversity, the Working Group on Indigenous Populations of the Subcommission on the Protection and Promotion of Human Rights and the United Nations Educational, Scientific and Cultural Organization (UNESCO).

²⁵ See General Assembly resolution 61/178, annex.

²⁶ Ibid.

19. There are a number of significant activities that ought to be recognized; however, the latest activities of the World Intellectual Property Organization aptly represent the most recent developments. In 2000, WIPO established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore to provide a forum to consider the interplay between intellectual property law and indigenous traditional knowledge. Two recent WIPO activities are of particular significance. First, the Committee has developed two comprehensive draft provisions addressing the protection of indigenous traditional knowledge. Those two documents set out a potential system of protection and aim to address comprehensively the practical issues that arise in the implementation of a *sui generis* system of protection. Second, the Committee has approved a study of customary law in recognition of the role of customary law and its relationship to indigenous traditional knowledge.²⁷ The study is, however, still in its early stages.

20. The World Intellectual Property Organization, through the Committee, has played a leading role in the push for the recognition of indigenous traditional knowledge and its protection from misuse and misappropriation. However, the pre-eminent role of WIPO has meant that the international debate has occurred primarily within the parameters of intellectual property law. International intellectual property law provides protection for creators of certain works, whether in the areas of literature, music, dance or art. Although this does at times suffice, for the most part intellectual property law fails to protect indigenous rights and interests because western constructs of intellectual property focus on individual knowledge and creativity rather than on communal transgenerational knowledge. Attempting to alter intellectual property law so that it accommodates traditional knowledge, knowledge that is completely different in essence, is reminiscent of the proverb, "You can't fit a round peg in a square hole". No matter how one tries, it just does not fit. It is for this reason that a completely new and customized approach is needed.

21. The call for *sui generis* protection has not necessarily been a call for an exchange of the current intellectual property system for a new system. It is a call for a *sui generis* system that complements the current system by providing protection to those areas of traditional knowledge that receive only very limited protection from international intellectual property law. Further, even where it has been recognized that *sui generis* protection is necessary, the *sui generis* protection contemplated has predominantly been located within the confines of a *sui generis* system of intellectual property law. Hence, the limited nature of such *sui generis* protection fails to account properly for the unique experiences of indigenous peoples, the unique nature of indigenous traditional knowledge and the role of customary law. Indigenous traditional knowledge is not simply a different type of intellectual property; it is a completely different entity. This is a distinction that is not generally appreciated, and as long as it remains unrecognized, questions will persist about the appropriateness of existing intellectual property regimes to protect indigenous interests.

²⁷ See http://www.wipo.int/tk/en/consultations/customary_law/index.html.

III. Objectives, scope and strategy of the study

22. It is recognized that international, regional and national documents provide some protection for indigenous traditional knowledge; however, they do not adequately address the concerns of indigenous peoples. The efforts by governmental bodies to prevent misappropriation and misuse of indigenous traditional knowledge, though admirable, are disparate and insufficient. Despite being an issue of international attention for many years and despite the creation of numerous documents, initiatives and activities, indigenous traditional knowledge is still vulnerable to misappropriation. Significantly, the fundamental question still remains; how can indigenous traditional knowledge be properly protected?

23. Acknowledging that the intellectual property regime is inadequate and recognizing the nature of indigenous traditional knowledge, the question becomes: should a *sui generis* system of protection be established that is unimpeded by western conceptions of intellectual property law but is instead guided by indigenous customary legal systems? If such a system is to be established, how can it and should it operate? A *sui generis* system grounded in customary laws could set standards and provide guidance to States as to the appropriate protection of indigenous traditional knowledge. In addition to providing international recognition of the right of indigenous peoples to enjoy their traditional knowledge and protect it from misappropriation and misuse and subsequently providing guidance to States, a framework that recognizes the relationship between indigenous traditional knowledge and customary law and provides space for the operation of indigenous legal systems will provide additional benefits to indigenous peoples that flow from the recognition of ownership.

24. **It is the recommendation of the Special Rapporteur that the Permanent Forum should commission a study, under its mandate to prepare and disseminate information, to determine whether there ought to be a shift in the focus on the protection of indigenous traditional knowledge away from intellectual property law to protection via customary law, and if so, how this should occur. The study should consider how indigenous traditional knowledge could be protected at an international level by utilizing customary law, including the extent to which customary law should be reflected, thereby providing guidance to States and subsequently protection at national and regional levels.**

IV. Issues to be considered by the study

25. Should the Permanent Forum accept the recommendation of the Special Rapporteur that a study be commissioned, a number of issues need to be addressed, both in the creation of the study and in the study itself.

A. Identifying the question

26. Embodied in the call for a study on customary laws pertaining to indigenous traditional knowledge are a number of questions and assumptions. In order to craft an effective study, careful consideration needs to be given to the nature of the question so that it will assist in determining both the nature and the parameters of

the study, which will in turn provide a foundation upon which an effective study can be built. There are three preliminary issues that must be considered: terminology, the nature of a *sui generis* system and the intended beneficiaries.

27. First, it must be recognized that there are some initial challenges posed by the variety of terminology used in this area. Terms such as “indigenous knowledge”, “traditional knowledge”, “indigenous knowledge, cultures and traditional practice”, “folklore”, “indigenous heritage” and “indigenous cultural and intellectual property” are often used interchangeably and invariably occur in different contexts, with different meanings attributed to them. Regardless of the terminology the Permanent Forum ultimately uses, the term should be clearly defined to indicate the parameters of the study. However, providing a comprehensive definition of traditional knowledge is a difficult task and one that has questionable benefits. If traditional knowledge is to be recognized and protected by providing a framework within which customary laws, as they relate to traditional knowledge, can operate, it may be in the best interests of indigenous peoples to leave the term undefined. The benefit of using a term that is clearly delineated from other terms but is not explicitly defined is that the content of the term is not fixed, and it will therefore be able to adjust and adapt to dynamic customary legal systems and novel aspects of traditional knowledge. The disadvantage of such an approach is that without a strict definition it may be difficult to ascertain what is actually included within such a term, which may lead to unacceptable levels of uncertainty. Such uncertainty could ultimately make any such instrument unworkable. Article 31 of the draft Declaration on the Rights of Indigenous Peoples may provide considerable guidance to the Permanent Forum in this regard.

28. Second, there needs to be a clear understanding of what exactly is being asked for when there is a call for a *sui generis* system of protection. In Latin, the term “*sui generis*” means “of its own kind”, and the English meaning of the term is “unique”. *Sui generis* is a term that has gained increased usage in indigenous rights jurisprudence, particularly as a vehicle to describe the unique interaction between indigenous peoples and dominant legal systems. Traditional knowledge is often labelled as *sui generis* to indicate the failure of dominant legal systems, particularly the intellectual property system, to properly account for it. The term is also used to positively affirm the unique nature and status of indigenous peoples and the right to protect their knowledge, customs and practices. However, it is important to ensure that *sui generis* does not ultimately result in reduced protection. Indigenous peoples have, in fact, experienced a reduction in specialized protection in other situations,²⁸ which may have come about as a result of the difficulties inherent in ensuring that dominant legal systems are sufficiently malleable to accommodate indigenous perspectives, experiences, rights and customary laws. In any event, it is crucial that whatever form of protection ultimately used has a positive impact on indigenous peoples and does not further alienate or misappropriate traditional knowledge and indigenous customary laws.

29. The call for *sui generis* protection may encompass a number of ideas. First, it may be used to indicate that the intellectual property regime is inadequate and to declare that there is a need for that system to adapt itself in unique ways in order to properly address the misappropriation and misuse of indigenous traditional

²⁸ For a list of resources concerning indigenous peoples’ experiences with respect to *sui generis* systems and customary law practices, see UNEP/CBD/WG8J/4/7, annex I.

knowledge. Second, the call for a sui generis system may also be used to indicate that the current systems of protection are inadequate and that as a result of the unique nature of indigenous peoples, their culture, knowledge and law, there is a need for a unique system of protection that is not bound by current systems and structures of national or international law. Finally, it may also be used to indicate that indigenous legal systems are of their own kind and, as customary systems, bear little resemblance to western legal systems of common law, civil law and international law. As a result of that lack of resemblance, a unique way of protecting indigenous traditional knowledge is needed that is grounded in indigenous legal systems. This final view resonates most soundly with the question asked by the Permanent Forum. Whatever the idea may be behind the call for a sui generis system, it seems that in the case of traditional knowledge, the current systems and activities are insufficient and something radically different needs to occur. The Permanent Forum should consider assessing what manner of sui generis system is required and thereby clarify what the study intends to address.

30. The final preliminary issue that need to be considered concerns the intended benefits of the study and the intended beneficiaries. It is important to recognize that much of the focus on that issue has been on protecting indigenous peoples from the misappropriation and misuse of traditional knowledge without the free, prior and informed consent of the traditional knowledge owners. Any system of protection that is developed needs to ensure that traditional knowledge is not taken inappropriately, without the free, prior and informed consent of the relevant peoples. However, the desire to protect traditional knowledge also includes the desire to recognize ownership and control, which creates an opportunity for indigenous peoples and communities to utilize a valuable resource. Without in any way justifying misappropriation, the fact that indigenous traditional knowledge has been misappropriated for so long and in so many circumstances is indicative inter alia of the commercial value of traditional knowledge. Proper protection will enable indigenous peoples to own and control traditional knowledge. This ownership and control will include the ability to protect secret and sacred aspects of traditional knowledge. It will also enable indigenous peoples to engage in local, national and international economies in a commercially viable manner, if that is what communities desire. Indigenous peoples constitute some of the poorest communities in the world and disproportionately live in situations of poverty. The opportunity to engage in trade and utilize a commercially viable resource should not be underestimated.

31. It is important that the Permanent Forum properly conceive of the nature of the question and the objectives of the study, including definitional challenges, assessing a sui generis system and being aware that the protection of traditional knowledge can act as both a sword and a shield. It may be that the questions will initially be difficult to define and answer; however, by keeping them at the forefront of the study, the Permanent Forum will be able to determine the parameters of the study and ensure that it does not diverge from its intended course.

B. Determining the relationship between international, regional, national and communal forums

32. The role of customary law in providing guidance and protection to indigenous peoples' traditional knowledge and the nature of the owners of traditional

knowledge necessarily locates the indigenous community as a central component of these issues. It is generally the indigenous community collectively, as distinct from the individual, that owns the rights to traditional knowledge. It may be a section of the community or, in certain instances, a particular person sanctioned by the community, that is able to speak for or make decisions in relation to a particular instance of traditional knowledge. Hence, the role of the community is central. In addition, the operation of customary law occurs at a community level. The operation of customary law within an indigenous community is significant in shifting the focus of protection away from dominant legal systems, such as intellectual property, to a system based in or upon indigenous legal systems.

33. There are indigenous peoples living in approximately 70 countries throughout the world and constituting approximately 350 million people, including 5,000 distinct peoples and over 4,000 languages and cultures. Among this vast population are many indigenous legal systems. On a global scale, it is not unreasonable to assume that there are at least as many legal systems associated with a fair proportion of indigenous peoples throughout the world. While the centrality of the community is self-evident, the challenges lie in deciphering the relationship between indigenous communities and international, regional and national forums. The central question in deciphering those relationships is how to resolve the intersection between international, regional, national and communal systems.

34. Indigenous peoples have looked to the international arena as a place to seek protection of their rights and their way of life and as a place for indigenous voices to be heard. Despite the early denials of access,²⁹ the international arena is now heavily engaged in protecting indigenous rights and in raising awareness of indigenous issues. It can provide a focal point in a discussion, such as this one, that have a very broad reach. The lack of protection afforded to traditional knowledge is an issue of international significance. The international arena operates as a focal point for this important discussion, and international law provides certain vehicles, such as the development of an international instrument, that are available to remedy the lack of protection. In addition, the symbolic importance of this discussion occurring and being resolved in the international arena cannot be underestimated.

35. Domestic laws intersect with traditional knowledge at another level. In some States, national laws have been implemented to address the issue; however, it can be generally stated that these are ad hoc and on the whole do not provide adequate protection. A host of issues arise when considering the role of national laws in such matters, but the predominant question is simply, can national laws be used effectively? If the answer to that question is "yes", then it is necessary to ask why this has not occurred and why it is an issue that remains central on the international stage. Perhaps the issue is not so much a question as to whether national laws could be effective, but rather whether they could be effective without the guidance provided by some activity occurring at an international level. Nevertheless, this is not an issue that can remain simply within the domestic domain. If that were to occur, the chances of the issue being resolved for all indigenous peoples would be negligible. The implementation of national legislation or policy will be a tool in the process of developing mechanisms of protection for indigenous traditional

²⁹ See "10 stories the world should hear more about: indigenous peoples: living in voluntary isolation", *United Nations Chronicle Online Edition*. Available from <http://www.un.org/Pubs/chronicle/2004/issue2/0204p18.asp>.

knowledge. It should not, however, be an issue left solely for the domestic realm. There clearly needs to be an international standard to guide domestic implementation.

36. The regional dimensions of traditional knowledge must also be recognized. Existing regimes that operate, particularly in Africa, Asia and South America are cognizant of the regional dimension of the issue. Simply put, indigenous communities are not necessarily located within national borders, indigenous customary legal systems may cross borders and interactions between indigenous communities, such as through trade, may occur across national borders. For those and other similar reasons, the regional aspect of traditional knowledge must be taken into account by any proposed model of protection.

37. The principal challenge is determining how the intersections between communities, States, regions and the international forum should be resolved. Providing the backdrop to that challenge is the issue of uniformity. No matter what mechanisms of protection are considered, the question of uniformity will need to be addressed. Obviously the benefits of uniformity are many, including clarity and consistency of law. However, in the present instance, a tension exists between uniformity and the recognition of the variety and diversity of customary laws and indigenous traditional knowledge. If, on the one hand, uniformity is given primacy over and above the protection of diversity, then any protection afforded to traditional knowledge may be at the expense of recognizing customary laws or of recognizing the dynamic nature of customary laws. It seems that such an outcome would be a hollow victory. On the other hand, if the diversity of customary legal systems is given primacy over uniformity, it is likely that a complex legal web will be woven, which may ultimately result in varying levels of protection for indigenous peoples. The tension between uniformity and diversity is not a new issue in international law or a new issue for the Permanent Forum, but is one that has particular significance in the present circumstances.

38. If international law were to take a back seat in the discussion, it would be difficult to envisage a solution that was not ad hoc. Further, without utilizing international mechanisms, it seems likely that any hope of uniformity will be lost. International law must be at the forefront of any discussion of traditional knowledge. Through international processes and the role of international law, guidance can then be given to both national and regional forums.

C. Determining the relationship between the study and existing structures, activities and resources

39. As indigenous peoples' traditional knowledge covers a wide range of areas, the protection of indigenous traditional knowledge may intersect with various areas of law or international issues, such as intellectual property law, environmental law, heritage and sustainable development. As a result, activities have tended to focus on either a particular aspect of indigenous traditional knowledge or a particular interaction between indigenous traditional knowledge and a specific area of law. For example, some activities focus on traditional medicinal knowledge, whereas other activities take a more general approach to protection. In recognition of such diverse

approaches, consultation and coordination between agencies working in this area has increased.³⁰

40. It will be necessary to identify existing systems, activities and resources and also identify all works in progress across the board. Identifying the existing systems and activities is crucial to ensuring that the work of the Permanent Forum is coordinated and integrated with the work of other United Nations and intergovernmental agencies. By being conscious of other agencies' activities, the Permanent Forum will be able to ensure that any work undertaken is structured in such a way as to avoid any unnecessary duplication. This will enable the Permanent Forum to undertake a study with the proper and efficient use of limited United Nations and Permanent Forum resources.

41. Existing systems and activities may be identified in several ways. It might be efficient to begin with a comprehensive literature review. Alternatively, it might be useful to initiate a follow-up workshop. In addition to ensuring that the Permanent Forum was updated as to the current state of affairs, a future workshop would allow experts and agencies to discuss the best way forward. However, depending on the approach taken by the Permanent Forum, a literature review might suffice and a workshop, if needed, might be more beneficial if it were to occur at a later stage in the study or perhaps even regularly for the duration of the study.

42. It is important that the Permanent Forum does not simply ascertain what systems, activities and resources already exist and then commission a study based on those arrangements. Once it has determined the structures and resources that either exist or are soon to exist, it will be necessary to assess their relevance and value as resources for this study. If such an assessment is not undertaken, the study may be misguided and the results of any study may be limited by assumptions embodied in prior work. For example, assessments should consider whether there are any assumptions underlying the work and whether the question and potential solutions being considered are located solely within a framework of intellectual property law and whether the work has been developed in consultation with indigenous peoples. The question of how those mechanisms should be assessed will need to be addressed by the Permanent Forum. A list of relevant objectives or criteria should be established to guide any such assessment. The assessment of existing mechanisms and resources will be fundamental in ensuring that there is optimal utilization of United Nations resources available to the Permanent Forum. Importantly, a proper assessment will identify areas that need to be addressed by the study and will also assist the Permanent Forum in determining the next step forward.

43. Once a proper assessment has occurred, the Permanent Forum will need to consider how any further developments that may result from the study may relate to existing mechanisms and resources. The Permanent Forum will also need to consider how any developments from the study will relate to any other developments that may occur, such as the creation of an international document by

³⁰ For example, UNESCO and WIPO have a history of collaboration, including the development of the Tunis Model Law on Copyright for Developing Countries (1976) and the formulation of the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (1982). For an extensive list of collaborative efforts between the Conference of the Parties to the Convention on Biological Diversity and WIPO, see UNEP/CBD/COP/8/INF/41.

the World Intellectual Property Organization. Any future developments by other United Nations or intergovernmental agencies should complement, rather than inhibit, the outcomes of the study and vice versa.

D. Potential structures and outcomes

44. The Permanent Forum seeks to enquire whether customary laws could be reflected in international and national standards. As mentioned previously, it seems clear that an international framework of some sort is necessary to provide guidance to States in this area. According to the outcome document of the Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovation and Practices, held at Geneva from 30 October to 1 November 2000, national sui generis systems by themselves will not be sufficient to protect traditional knowledge adequately. There is therefore a need to explore an international mechanism that might explore minimum standards of an international sui generis system for traditional knowledge protection.

45. On that basis, the elements presented below are limited to potential mechanisms of protection located within the international arena. The presumption is that any mechanism developed internationally will in due course filter down to States and will be implemented nationally.

46. Although there are various options internationally, it seems that the principal options tend to involve the development of an international instrument. It has been suggested, by both the Workshop and the Permanent Forum, that customary laws should be reflected in international standards. That could occur through the creation of a treaty, a framework agreement, a memorandum of understanding or a number of other structures. It should be noted that the mechanisms considered in the present concept paper are not intended to limit in any way the potential structures that may be considered in the study.

47. A treaty is one way in which customary laws could be reflected in an international document and provide a strong basis upon which traditional knowledge could be protected. If a treaty were developed for the sole purpose of ensuring protection of indigenous traditional knowledge, rather than in unison with other issues, the level of specificity would need to be carefully considered. If articles within a treaty were highly specific and provided detailed requirements as to what might constitute traditional knowledge or what circumstances might be afforded protection, then this could potentially raise concerns of inflexibility. However, inflexibility is also an issue with respect to the operation of a treaty as a whole. For example, if customary law were to be completely reflected in an international treaty, this could inhibit the development of customary law, and the treaty could be perceived as unnecessarily inflexible. A treaty that specifically details the subject matter would be uniform in nature, but indigenous peoples, customary laws and traditional knowledge are not uniform in nature. The concern with such a treaty is that it might not allow enough room for the operation of the diverse customary legal systems of diverse indigenous peoples throughout the world.

48. Similarly, in addition to potentially being inflexible with respect to its subject matter, a specific treaty that seeks to codify customary law may struggle to aptly protect the rights of indigenous peoples to their traditional knowledge. The reason for this is that any attempt to codify customary law at international level will be

artificial. For example, the vast number of indigenous legal systems in the world are not uniform. Although there may be certain commonalities, such as a tendency for communal rather than individual ownership, this may not always be the case. As a result, any attempt to reflect customary law in international law by articulating customary law principles as they pertain to traditional knowledge may in fact limit the operation of customary law and accordingly, fail to protect traditional knowledge. Such an outcome could have disastrous effects on indigenous peoples. The same concerns would apply if customary laws were not codified internationally but a treaty encouraged codification nationally.

49. A further issue to consider is the question of what mechanism would be put in place to handle disputes over the interpretation of indigenous traditional knowledge. The issue of interpretation becomes particularly important in situations of secret or sacred knowledge. If customary law is subject to some form of codification, the question of who interprets the law is pertinent. In the case of an international treaty, disputes may be resolved by way of diplomacy, through an entity created by that treaty for that particular purpose, such as a tribunal or a committee, or in some circumstances through the International Court of Justice. In such a situation, it would be important to recognize that it is States that have standing in the Court. Private persons, collectivities and international organizations are not entitled access to the Court, although public international organizations, including such specialized agencies as the World Intellectual Property Organization and the organs of the United Nations do have access in various circumstances.³¹ In order for the Court to deal with disputes under a treaty to protect indigenous traditional knowledge it would be necessary for that treaty to include a jurisdictional provision enabling such access to occur.³² The study may find that dispute resolution and legal interpretation via the International Court of Justice is not the preferred option. In any event, the process of treaty-making necessarily requires some mechanism or some forum in which disputes, including disputes as to the interpretation of provisions, can be resolved. By codifying customary law and completely or substantially reflecting customary law in an international instrument, the danger for indigenous peoples is that the power of interpretation of the treaty, including the power to interpret customary laws, will be posited in a non-indigenous body. It may be that a central body would be useful to settle such disputes; however, such a decision should be made with caution while being cognizant of the potential for such a body to usurp the power of indigenous peoples to interpret the law and, consequently, their power to make laws.

50. The study should also consider the development of a treaty that does not specifically articulate principles of customary law but still provides general protection to traditional knowledge. Such a treaty may provide fairly general protection, although in more detail than article 8 (j) of the Convention on Biological Diversity or the draft Declaration, but also provide the actual mechanics of such protection, including provisions for arbitration and enforcement. Such a treaty would reflect customary law but not articulate customary law. Although situated nationally, an example of general protection can be found in section 35, paragraph 1 of the Constitution Act of Canada, 1982, which states, "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and

³¹ See <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicorgansandspecialized.html>.

³² See *Statute of the International Court of Justice*, article 36, para. 2. Available from <http://www.icj-cij.org/icjwww/icjhome.htm>.

affirmed". A provision that recognizes and affirms the rights of indigenous peoples to their traditional knowledge may be a conduit for international recognition while avoiding the dangers of detailed articulation of customary laws. A provision that recognizes and affirms traditional knowledge would provide legal space for the operation of customary laws. It may be that subsequently a more complex legal relationship would need to be developed between indigenous customary law and domestic law; however, that relationship would be guided by the international recognition and affirmation of indigenous peoples' rights to their traditional knowledge.

51. Two different approaches to the creation of a traditional knowledge treaty have been suggested: a specific treaty that codifies customary law to some extent, and a more general treaty that creates legal space for the continuing operation of indigenous legal systems without impinging upon their operation. In considering whether either of those proposals is a viable option, the study by the Permanent Forum should consider the relative advantages and disadvantages. As mentioned, issues of uniformity, flexibility, dispute resolution and interpretation ought to be part of the process of assessing the relative merits of the models. In addition, the study must carefully consider the issue of registration. The study should also closely examine the appropriateness of codification: it may not be the ideal method for indigenous peoples to retain control of their customary law.

52. In addition to advocating the creation of a treaty, the Permanent Forum should promote other structures, such as a framework agreement or a memorandum of understanding.

53. Regardless of which models are contemplated, the Permanent Forum will need to consider whether there should be a document, structure or forum that addresses all aspects of indigenous traditional knowledge or whether there should be a separation of issues across various documents, structure or forums. On the one hand, if there is to be a separation, then how could customary law be recognized across diverse areas? Could this occur with uniformity? On the other hand, if a central document or structure were to be created, how would it interact with existing instruments, such as article 8 (j) of the Convention on Biological Diversity? Such questions will need to be considered irrespective of the mechanisms of protection that are examined. Further, the question of arbitration should be carefully considered. The study should consider whether a body should be established that is constituted by indigenous peoples or whether, alternatively, an established forum, such as the Human Rights Council, could be utilized. Finally, no matter which vehicle is used, the questions of enforcement and mechanisms for compliance will need to be addressed.

54. In addition to legal mechanisms for protection, it is important for non-legal approaches to be considered. Although a legal response is most likely necessary, it may be beneficial to consider what structures could exist outside of the international forum. For instance, the Permanent Forum might be able to advocate initiatives, such as the creation of an indigenous label similar to the Fairtrade Certification Mark, in order to identify indigenous ownership.³³ Such a campaign might have far-

³³ Report of the UNCTAD-Commonwealth Secretariat Workshop on Elements of National Sui Generis Systems for the Preservation, Protection and Promotion of Traditional Knowledge, Innovations and Practices and Options for an International Framework, held at Geneva,

reaching effects and could assist in raising awareness of this issue globally. It could be undertaken as an initiative, either separately or in addition to the creation of a formal instrument.

55. In summary, there are a number of potential mechanisms of protection located within the international arena that could reflect customary law to varying degrees and that could be developed in order to properly protect indigenous traditional knowledge both at an international and a national level. Careful consideration of the relative benefits of each instrument will help to develop a mechanism of protection that assists indigenous peoples in their fight to protect their traditional knowledge. Although the process of developing an instrument or structure will not be easy and a host of difficult issues will need to be addressed, the process itself is important. By engaging in a consideration of potential structures with an awareness of the issues outlined above, the Permanent Forum will be able to navigate its way through this complex area.

V. Concluding comments

56. The Permanent Forum may consider it appropriate to recommend to the Economic and Social Council that it commission a study under its mandate as one way of resolving the issue of protecting indigenous traditional knowledge. Furthermore, the Permanent Forum may consider providing advice to the Economic and Social Council about the conduct of the study, including what role the Permanent Forum might be given in the examination of this question. Alternatively, the Permanent Forum may decide to examine the issue under its own mandate.

57. The Permanent Forum could create a subsidiary forum, such as an intersessional meeting, appoint a Special Rapporteur or leave the matter with organizations currently engaged in this issue. The Permanent Forum could decide the best approach is to support the existing processes. As another option, the Permanent Forum may consider dedicating part of one of its sessions, making it into a working session of three days or so, to consideration of the matter. The Permanent Forum could also, as another approach, appoint five or so members to hold specialized meetings on indigenous traditional knowledge during its sessions. If an intersessional meeting were decided upon, it could consist of members of the Permanent Forum and representatives from the United Nations, intergovernmental agencies and indigenous experts involved in the issue, which may provide a suitable forum for overseeing the study. The potential role of the inter-agency support group should also be taken into account. The Permanent Forum should also consider whether a Special Rapporteur dedicated to this task should be appointed or whether the study should be left in the charge of other entities. Regardless of how the study is initiated, the question of an appropriate budget will need to be considered, bearing in mind that the question of resources available to the Permanent Forum remains unresolved.

58. There are several other practical matters that may need to be addressed initially, such as whether there should be "exploratory missions" and whether pilot projects should be established in particular countries, and if so, at what stage of the

Switzerland, 4-6 February 2004. Mimeo. Available from http://www.unctad.org/trade_env/test1/meetings/tk2/TKworkshop.report.final.2August2004.pdf.

project. As those decisions will have budgetary ramifications, it would be beneficial if they were contemplated at the outset.

59. In constructing a study that aims to address the continued failure to protect traditional knowledge, the Permanent Forum should be cognizant of the process. Developing an appropriate process as to how this issue should be addressed will assist in working towards a successful outcome. The study should call upon the experience gained surrounding the elaboration of the draft United Nations Declaration on the Rights of Indigenous Peoples through the United Nations system. The capacity of such a process to educate and generate cross-cultural awareness should not be underestimated. The Permanent Forum may wish to consider how, and to what extent, indigenous peoples can be involved in setting up the study. This may be done by consulting indigenous peoples as to what process should be used or by developing a code of conduct.³⁴ Although this will take some time, if there is to be a shift to a truly sui generis system of protection, creating a sui generis system of enquiry may be a crucial first step.

60. The Permanent Forum, in addition to considering what role it wishes to have and how to develop an appropriate process, should consider the intended outcomes of the study. Those considerations include articulating the expected accomplishments of the study and developing indicators of achievement or evaluation criteria in order to determine the quality and effect of the study. Although the criteria could be amended as the study evolved, they would be an important part of the process of clarifying the intended objectives of a study. The study must be mindful not to raise the expectations of indigenous peoples unnecessarily and unrealistically.

61. Despite being an issue of international attention for many years, indigenous traditional knowledge is still vulnerable to misappropriation. It is time to recognize that indigenous traditional knowledge is not simply an intellectual property issue. Likewise, it is not simply a human rights issue, a trade issue or an amalgamation of those issues. The proper protection of indigenous traditional knowledge is an indigenous issue and indigenous peoples should be central to the process.

³⁴ See UNEP/CBD/WG8I/4/8.